

# THREE CONCEPTS OF CHILDREN'S CONSTITUTIONAL RIGHTS: REFLECTIONS ON THE ENJOYMENT THEORY

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## I. THE CHILD: A PERSON OR A NON-PERSON IN CUSTODY?

Attempts to extend constitutional rights to children did not succeed in American law until the late 1960s, when the Supreme Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>1</sup> In the case of *In re Gault*, the Supreme Court pronounced that juveniles are entitled to a variety of procedural protections under the Constitution.<sup>2</sup> For example, they must be given adequate, timely, written notice of any allegations against them.<sup>3</sup> If they are in danger of losing their liberty they are to be afforded the right to counsel,<sup>4</sup> the right against incrimination,<sup>5</sup> and the right to confront and cross-examine opposing witnesses under oath.<sup>6</sup> Subsequent cases have emphasized juveniles' rights to proof beyond a reasonable doubt<sup>7</sup> and protection against double jeopardy.<sup>8</sup>

There is a temptation to characterize the Court's decisions on children's rights during the period from 1968 to 1980 with the statement of Justice Blackmun in *Planned Parenthood of Central Missouri v. Danforth*.<sup>9</sup> In writing the majority opinion, Blackmun wrote that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>10</sup> Almost as frequently cited in characterizing this period is the statement of Justice Fortas, who wrote the majority opinion in a case that extended free speech rights to chil-

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<sup>1</sup> *In re Gault*, 387 U.S. 1, 13 (1967).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.* at 33.

<sup>4</sup> *See id.* at 36.

<sup>5</sup> *See id.* at 55.

<sup>6</sup> *See id.* at 57.

<sup>7</sup> *See In re Winship*, 397 U.S. 358, 368 (1970).

<sup>8</sup> *See Breed v. Jones*, 421 U.S. 519, 541 (1975).

<sup>9</sup> 428 U.S. 52 (1976).

<sup>10</sup> *Id.* at 74.

dren.<sup>11</sup> He wrote that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . ."<sup>12</sup>

It would be a mistake, however, to conclude from these pronouncements that the Court, having decided in the late 1960s and the 1970s that children are "persons," determined that children should have the same set of constitutional rights that we ascribe to adults. If the Court did see children as persons, then it surely saw them as peculiar sorts of persons for purposes of constitutional analysis. For example, during the 1970s the Court also decided that juveniles did not have three of the procedural rights that adults take for granted: the right to a trial by jury,<sup>13</sup> the right to bail prior to adjudication,<sup>14</sup> and the right to be protected from corporal punishment.<sup>15</sup> The only additional good news for advocates of children's rights during this period consisted of rulings in two cases that extended the right to privacy in abortion cases to unmarried minor females.<sup>16</sup>

The usual justification for this confusing set of adjudications was that children must be "safeguarded from abuses,"<sup>17</sup> and that the state may continue to create laws that will help parents and teachers discharge their joint responsibility for their children's well-being. Moreover, the Court said, since children do not have the "full capacity for individual choice,"<sup>18</sup> they may be deprived of certain adult rights (e.g., to marry, to vote), and their activities can be regulated if it can be shown that this will "safeguard the family unit and parental authority."<sup>19</sup> In sum, the catch-phrase of the 1970s Court that "children are persons" is precisely that: a phrase that lacks the precision of a normative principle. Although we learn from it that children have *some* legal rights under the Constitution (and thus are in a different category from animals or trees), since the Court obviously does not intend by it that

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<sup>11</sup> See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

<sup>12</sup> *Id.* at 511.

<sup>13</sup> See *McKeiver v. Pennsylvania*, 403 U.S. 528, 554-55 (1976).

<sup>14</sup> See *L.O.W. v. District Court*, 623 P.2d 1253, 1255 (Colo. 1981).

<sup>15</sup> See *Ingraham v. Wright*, 430 U.S. 651, 682 (1977).

<sup>16</sup> See *Danforth*, 428 U.S. at 75 (holding that a minor's privacy right outweighs a parent's interest in the termination of the minor's pregnancy); *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (invalidating statute that prohibits all "mature and fully competent" minors from seeking abortions without parental consent).

<sup>17</sup> *Carey v. Population Servs. Int'l*, 431 U.S. 678, 707 (1977) (Powell, J., concurring in part).

<sup>18</sup> *Bellotti*, 443 U.S. at 635 n.13.

<sup>19</sup> *Danforth*, 428 U.S. at 53.

children have equal rights with adults, we are left without a principle that will inform us about *which* constitutional rights ought to be extended to children.

During the next fifteen year period from 1980 to 1995, the Court dropped most of the rhetoric of the 1970s Court in the several cases it considered involving the treatment of children. In this period, the Court approved the practice of pre-trial detention of juveniles,<sup>20</sup> significant restrictions on students' freedom of speech,<sup>21</sup> and elimination of the probable cause requirement,<sup>22</sup> warrants, and individualized suspicion for searches of students on school grounds.<sup>23</sup>

In place of the frequent reminders by the 1970s Court that children are persons, the 1980s Court focused on the fact that children, unlike adults, are under the custodial control of their parents. Although children have a substantial interest in their own freedom, nonetheless,

that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.<sup>24</sup>

Therefore, the Court in *Schall v. Martin* reasoned that, if there is a serious risk that an accused juvenile might commit a crime prior to completion of a fact-finding hearing, then it is not a violation of the Due Process Clause to detain him until the hearing is concluded.<sup>25</sup> Similarly, in *Vernonia School District 47J v. Acton*, the Supreme Court held that random, suspicionless drug testing of student athletes was not a violation of the Fourth Amendment.<sup>26</sup> Children have a lesser "legitimate expectation of privacy" than adults because they are al-

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<sup>20</sup> See *Schall v. Martin*, 467 U.S. 253, 268 (1984) ("[T]he practice [of detaining juveniles before trial] serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause in juvenile proceedings.").

<sup>21</sup> See *Bethel v. Fraser*, 478 U.S. 675, 686 (1986) ("The school disciplinary rule proscribing 'obscene' language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.").

<sup>22</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) ("Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.").

<sup>23</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (finding that "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake").

<sup>24</sup> *Schall*, 467 U.S. at 265.

<sup>25</sup> See *id.*

<sup>26</sup> See *Vernonia*, 515 U.S. at 665 (holding that the searches performed on public school students did not violate the Fourth Amendment).

ways in some form of custody, and children in school "have been committed to the temporary custody of the State as schoolmaster."<sup>27</sup> Since the public school system is responsible for acting "as guardian and tutor of children entrusted to its care,"<sup>28</sup> the Fourth Amendment must be more lenient in an educational setting.<sup>29</sup>

In the thirty year history of its rulings on the constitutional rights of children, the Supreme Court appears to have struggled with the following dilemma: either children are to be regarded as *persons* with fundamental rights that the state must respect, or they are to be regarded as *human beings* who are always in some form of custody. If children are persons with fundamental rights, then how can the Court justify the different treatment that children receive under the Constitution? That is, if both children and adults are "persons," then shouldn't children and adults have the same set of constitutional rights? On the other hand, if children are categorized as humans who are always in some form of custody, then why should they be accorded any constitutional rights at all? Why, for example, shouldn't children be treated by the juvenile courts the same way that they were treated prior to the 1960s: benevolently, but without any due process rights?

There are at least three possible solutions to this dilemma. Each solution proposes an interpretation of children's constitutional rights that attempts to accommodate the fact that children are under the control of either their parents or the State. The solutions are these: (1) children's constitutional rights are rights of a scope that is more *limited* than the scope of adult constitutional rights of the same name (e.g., the right to freedom of speech); (2) children's constitutional rights are rights that can be *outweighed* by important familial or State interests which do not outweigh adult rights of the same name; (3) children's constitutional rights are *rights-in-trust*, that is, rights which children possess but which, in some cases, they are justifiably prevented from enjoying.

## II. CHILDREN'S RIGHTS AS LIMITED SCOPE RIGHTS

In 1980, the authors of a lengthy note on "The Constitution and the Family" in the *Harvard Law Review* wrote that

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<sup>27</sup> *Id.* at 646.

<sup>28</sup> *Id.* at 665.

<sup>29</sup> See *id.* (stating the standard for constitutionality in this case under the Fourth Amendment as "whether the search is one that a reasonable guardian and tutor might undertake").

there were two reasons why a child may not be entitled to the full constitutional protection that an adult would receive under similar circumstances:

First, a child may possess a constitutional right of lesser magnitude than an adult possesses. This might be the case if the values animating a given constitutional provision were not as applicable to children as adults. Second, the state may be able to assert interests to support its treatment of children that it could not assert with respect to adults. This would be the case if the state's treatment of children fell within its police power or *parens patriae* power while the treatment of identically situated adults did not come within either category.<sup>30</sup>

I suppose that what is meant by the phrase "right of a lesser magnitude" is that the *scope* of the right may be smaller for children than for adults. Consider, for example, First Amendment rights. The scope of First Amendment rights is not unlimited either for adults or children; that is, the courts have never guaranteed anyone a "right" to say anything, any time, any place. But the Court has set more limits on First Amendment rights for children than it has for adults.<sup>31</sup> On the Harvard interpretation of what it means to say that children have the constitutional right of freedom of speech, both children and adults *have* the right to free speech, but the *scope* of free speech is narrower for children than for adults. To say that a child has the right to free speech means something quite different from what it means to say that an adult has this right. Neither an adult nor a child can use the First Amendment to justify a speech act of defamation, fraud, incitement to riot, or solicitation to crime.<sup>32</sup> But a child in school has the further restriction of refraining from speech that uses "vulgar and offensive terms [to make a political point] in public discourse."<sup>33</sup>

One advantage of the Harvard approach is that it provides an interpretation of Justice Blackmun's assertion that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights."<sup>34</sup> Second, the Harvard approach also explains how a child can have a constitutional

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<sup>30</sup> *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1161, 1358 (1980).

<sup>31</sup> See, e.g., *Bethel v. Fraser*, 478 U.S. 681, 683 (1986) (permitting public schools to restrict students' offensive speech).

<sup>32</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (incitement to violence); *Smith v. California*, 361 U.S. 147 (1959) (defamation); *Donaldson v. Read Magazine*, 333 U.S. 178 (1948) (fraud).

<sup>33</sup> *Bethel*, 478 U.S. at 683.

<sup>34</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

right but also be regarded as subject to the custody and control of his parents or the State. The function of the right is to set a limit on what a custodian can demand of the child who is under his control. For example, even though the scope of a child's free speech right is narrower than that of an adult, its scope is sufficiently large that a child cannot be prevented by his custodians from advocating a view that is unpopular or controversial.<sup>35</sup>

However, there are several disadvantages of the Harvard interpretation of the constitutional rights of a child. First, I am not at all sure that when Blackmun wrote that minors are protected by the Constitution, he meant that the Constitution protects a set of rights having a different scope from that enjoyed by adults. This seems clear from his ruling in *Danforth* in which he said *without qualification* that a minor has the right of personal privacy, or a guarantee of certain areas or zones of privacy, which "encompass a woman's decision whether or not to terminate her pregnancy."<sup>36</sup> He did not say or imply that this right was in some way different from an adult woman's right of personal privacy. Second, the Harvard approach gives us *two* sets of constitutional rights, one for adults and the other for children, where the difference between rights in each set having the same name is a difference in their scope. Why not a third, fourth and even more sets of rights for other classes of persons? The question that is begged by the Harvard approach is: "What are the criteria for deciding whether a given class of persons should have rights of the same or of a different scope from persons of another group or class?"

Third, I have a more general concern about the very idea of constitutional rights of the same name having varying scopes. Suppose, for example, that John, a U.S. citizen, has the right to give a public speech about his dissident political beliefs, but Manzar, a citizen of Iran, does not have this right. However, Manzar does have the right to talk publicly about controversial non-political topics. I believe that we would characterize this situation by saying that John has the right to freedom of speech, but Manzar does not. It would be not only odd, but misleading to say that Manzar has the right to freedom of speech but her right has a narrower scope than John's. This is because we understand the very concept of a constitutional right to freedom of speech to include political

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<sup>35</sup> See *Bethel*, 478 U.S. at 681 (referring to the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms").

<sup>36</sup> *Danforth*, 428 U.S. at 60 (quoting *Roe v. Wade*, 410 U.S. 113 (1973)).

expression. Where it does not include political expression, we would reasonably conclude that the right to freedom of speech does not exist.

This two-tiered approach to constitutional rights is reflected in the Supreme Court's decision in *Bethel v. Fraser*.<sup>37</sup> High school student Matthew Fraser gave a nominating speech for a fellow student who was running for elective office at the school. In the speech, Fraser referred to the candidate using a metaphor that was "elaborate, graphic and explicit[ly] sexual."<sup>38</sup> In upholding the school's decision to punish Fraser by suspending him from school for two days, the Court maintained that although adults have the constitutional right to use "offensive form[s] of expression . . . [to make] a political point",<sup>39</sup> the same liberty is not necessarily available to juveniles in public schools.<sup>40</sup> But if this right is not available to juveniles, then we should not conclude that children in school have a constitutional right to freedom of speech that is narrower in scope than the adult right to freedom of speech. The correct inference is that children in school do not have the constitutional right to freedom of speech at all. There is one right to freedom of speech in the Constitution, and it includes the right to use offensive forms of expression to make a political point.

Before turning to an examination of the next concept of children's rights, I want to make a brief comment about the Harvard claim that a child may possess a constitutional right of lesser magnitude than an adult possesses "if the values animating a given constitutional provision were not as applicable to children as adults."<sup>41</sup> Although I accept the implication that this may be the best way to interpret the Constitution,<sup>42</sup> it is not clear to me why the values relevant to amendments should not be as applicable to older children as to adults. On the basis of what criterion are we to decide this? In the case of free speech, it might be said that the "animating value" is the value of knowing the truth. That is, when speech is free, we are more likely to make progress toward discovery of the truth than we are when speech is restricted. But why should this value not be as applicable to

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<sup>37</sup> 478 U.S. 675 (1986).

<sup>38</sup> *Id.* at 678.

<sup>39</sup> *Id.* at 682.

<sup>40</sup> See *id.* ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

<sup>41</sup> *Developments in the Law*, *supra* note 30, at 1358.

<sup>42</sup> For further comment on theories of constitutional interpretation, see *infra* notes 73-74 and accompanying text.

high school students as it is to college students or other adults? This question remains unanswered.

### III. CHILDREN'S CONSTITUTIONAL RIGHTS AS RIGHTS-TO-BE-BALANCED

A second interpretation of the concept of constitutional rights of children is the "interest-balancing" approach. This interpretation is suggested in the second part of the Harvard position quoted earlier: "[T]he state may be able to assert interests to support its treatment of children that it could not assert with respect to adults."<sup>43</sup> During the 1970s, the Court frequently prefaced its decisions about the rights of children by implying that the question before the Court concerned the extent to which a child's acknowledged constitutional rights should be "outweighed" by the State's interest in protecting them from harm.<sup>44</sup> In *Danforth*, for example, Blackmun conceded that the Court "long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults."<sup>45</sup> Accordingly, the *Danforth* Court proceeded to weigh the privacy right of a competent minor seeking an abortion against her parents' interest in the termination of her pregnancy.<sup>46</sup>

This is troublesome. In *Roe v. Wade*,<sup>47</sup> the Court held that the decision to abort one's pregnancy falls within the scope of the constitutional right of privacy. Having thus determined that abortion is within the area of constitutional protection, it is no longer open to the Court to "weigh" that protection against other considerations (e.g., strengthening the family unit, protecting the mother from harm). For it is precisely the character of constitutional rights that once correctly identified, they "always have more weight than any possible combination of opposing interests, public or private."<sup>48</sup> If the Court proclaims that a child has the constitutional right of privacy, then it cannot "weigh" and "balance" this right against family

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<sup>43</sup> *Developments in the Law*, *supra* note 30, at 1358.

<sup>44</sup> See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976) (asking "whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *In loco parentis* that is not present in the case of an adult").

<sup>45</sup> *Id.* at 74.

<sup>46</sup> See *id.* at 75 ("Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.").

<sup>47</sup> 410 U.S. 113 (1973).

<sup>48</sup> JOEL FEINBERG, *SOCIAL PHILOSOPHY* 81 (1973) (citing Laurent B. Frantz, *The First Amendment in the Balance*, 71 *YALE L.J.* 1424, 1438 (1962)).



or other interests any more than it can do this in the case of an adult.<sup>49</sup> For this reason, the Court's proper focus in cases such as *Danforth* is not whether a child's privacy right is outweighed by the State's interest in protecting the child from harm; such an inquiry is incoherent. Instead, the Court must determine whether children ought to be granted the constitutional right of privacy *at all*. It is only in regard to the latter issue that considerations of state paternalism are relevant. Accordingly, if the Court determines that children, like adults, *do* possess the constitutional right of privacy, it is thereafter barred from raising the issue of the child's welfare as a basis for diminishing the child's privacy right.

#### IV. THE ENJOYMENT THEORY OF CHILDREN'S CONSTITUTIONAL RIGHTS

In a recent paper Philip Fetzer and I suggested that a useful approach to the resolution of the dilemma about children's constitutional rights is to distinguish between *having* a right and *enjoying* a right.<sup>50</sup> In the same way that property law allows us to speak of an individual possessing a "future interest," so in constitutional law we might speak of a child possessing the right to be treated as a person although complete enjoyment of this right might justifiably be postponed.<sup>51</sup>

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<sup>49</sup> At the symposium at which this paper was presented, Professor Emily Buss objected to this passage, saying that the Supreme Court's notion of a "compelling state interest" can be defined as an interest that outweighs or overrides an acknowledged constitutional right. For example, in *Roe*, 410 U.S. at 159, the Court noted that the State may have a "compelling interest" in protecting the potentiality of fetal life. If the State wishes to protect fetal life after viability, "it may go so far as to proscribe abortion during that period, except when it is necessary to protect the life or health of the mother." *Id.* at 163-64. In other words, when this condition is met, is it not the case that a State interest has been allowed to outweigh or overbalance the constitutional right of privacy?

However, consistent with my thesis that a constitutional right is absolute once its scope has been determined, we can give another interpretation of the Court's approach. The recognition of a "compelling state interest" can be understood as a way of narrowing the scope of a woman's privacy right in the third trimester of her pregnancy. Thus, a woman in the third trimester has an absolute right to an abortion except when medical judgment determines that it is not necessary to protect her life or health. This narrow right is absolute in the sense that it lays unconditionally incumbent duties of respect and enforcement upon the courts - that is, no (other) State interest is allowed to outweigh it.

<sup>50</sup> See Philip Fetzer & Laurence Houlgate, *Are Juveniles Still 'Persons' Under the United States Constitution? A New Theory of Children's Constitutional Rights*, 5 INT'L J. CHILDREN'S RTS. 319 (1997).

<sup>51</sup> See Herbert Morris, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 49-50 (1979) (discussing rights that are an inherent part of being human).

There are two situations in which this might occur: (1) situations in which a child is clearly incapable of exercising a constitutional right; and (2) situations in which a child, though capable of exercising the right, might damage his future ability to exercise his rights if presently allowed complete enjoyment of his rights. Let me explain by discussing these situations in more detail.

A small child might be regarded as a person under the Constitution with the right to freedom of religious choice, even though he presently lacks the cognitive capacity to form or express such beliefs. Of course, the usual objection to this characterization is that possession of the capacity to exercise a right is a necessary condition for possessing it.<sup>52</sup> That is, it has been argued that if a small child lacks the capacity to pray, to attend church services, and to promulgate his faith to others, then surely it makes no more sense to say that he has the right to do these things than it would be to say this about the family dog.<sup>53</sup>

But there is a significant difference between the child and the family dog. The child is a person. He will eventually become an adult able to freely and knowledgeably choose, and who will be prepared to assume responsibility for his choices. Hence, to say that the infant *qua* person has the right of religious expression could only be construed as a *right-in-trust*. That is, it is best interpreted as the right to have his future options kept open until he is a fully developed, self-determining adult capable of forming his own opinions about religion and making public expression of his beliefs.

When we attribute moral or legal rights to children who are clearly not yet capable of exercising them, we refer to rights that are to be *saved* for the child until he or she is an adult. Moreover, these rights can be violated "in advance," so to speak, before the child is even in a position to exercise them. Legal philosopher Joel Feinberg has observed that "[t]he violating conduct guarantees *now* that when the child is an autonomous adult, certain key options will already be closed to him. His right while he is still a child is to have these future options kept open until he is a fully formed self-

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<sup>52</sup> See, e.g., John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1758 (1981) ("[T]he rationales thought to justify protection of the various constitutional freedoms presuppose that the claimant can make rational decisions that will not result in significant social or individual harm.").

<sup>53</sup> See *id.* at 1760 ("The qualities of experience, judgment, and moral conviction that govern those [religious] choices are not ones that we attribute . . . to young children.").

determining adult capable of deciding among them . . . .<sup>54</sup> For example, an infant of two months has the right to walk freely down the public sidewalk, even though she is not yet capable of enjoying this right. What then could it mean to say that she has the right to freedom of movement? The answer is that it is a right-in-trust. It is a right to be saved for the child until she gains the ability to walk. One would violate this right now by cutting off her legs, making it physically impossible for her to ever be capable of self-locomotion at some future time.<sup>55</sup>

What about older children who are clearly capable of exercising and enjoying at least some constitutional rights? For example, in *Bethel*,<sup>56</sup> no one doubted that 17-year-old Matthew Fraser had the cognitive and emotional ability to form and express his own political opinions. The basis for his suspension from high school was not his incapacity to advocate an unpopular and controversial opinion, but that his speech was "acutely insulting"<sup>57</sup> and "disruptive."<sup>58</sup> Significantly, such grounds would never be recognized by the Court as a basis for prohibiting adult speech.<sup>59</sup>

Older children, like Matthew Fraser, though competent, are still under the control of their parents, school administrators, and ultimately, the State. Is there any way of reconciling their status as individuals-in-custody with their status as "persons" under the Constitution?

My suggestion is that the personhood of older children, like that of younger children, can also be understood as a right-in-trust, but with this important difference: the grounds for postponing an older child's enjoyment of his fundamental rights are nearly identical to the grounds for postponing an adult's enjoyment of the same.

Nearly, but not quite identical. The older child is still un-

<sup>54</sup> Joel Feinberg, *A Child's Right to an Open Future*, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY AND STATE POWER 126 (W. Alken & H. LaFollette eds. 1980).

<sup>55</sup> A more realistic example of how a right-in-trust can be violated is the practice in some cultures of female genital mutilation. In this case, the relevant (violated) right is the right to sexual freedom. Although a young girl is not capable of sexual pleasure, her parents could violate her right to sexual freedom *now* by mutilating her genitals, making it physically impossible for her to enjoy herself sexually when she becomes an adult.

<sup>56</sup> 478 U.S. 675 (1986).

<sup>57</sup> *Id.* at 683.

<sup>58</sup> *Id.* at 686.

<sup>59</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech. . . .").

der the custodial control of his parents. However, the fact that the older child is competent to exercise his constitutional rights severely limits what his parents or the State can do to him while he is in their custody. The point of reminding ourselves that the older child is a person is that this places strict limits on the kind and degree of legitimate interference by his custodians. To be specific, the child's custodians must provide conditions for the child to become an adult who is freely able to make informed choices, that is, to become autonomous. Hence, any interference in the child's attempt to exercise his rights is justifiable only if it can be established that this is necessary to protect his future autonomy. For example, in *Bethel*, if evidence had been presented to indicate that when high school students give offensive speeches, they put at risk their future ability to exercise their free speech rights, this would have constituted sufficient grounds for postponing Fraser's right to give his speech. It is only under this limitation that his custodians could argue that they are respecting Matthew as a person under the Constitution by preserving his rights.

Employing the distinction between having a right and enjoying a right and the related notion of a right-in-trust, I am suggesting the following three-part theory of the constitutional rights of older children. First, because children are persons, they have the same set of constitutional rights possessed by adults. Second, primarily because they are still under the custody and control of their parents or the State, the full enjoyment of their constitutional rights may sometimes be postponed. However, third, the complete enjoyment of a right can be postponed only if there is evidence that exercise of the right now will damage the child's future autonomy. Restrictions on an older child's enjoyment of his rights for any other reason (e.g., because the exercise of his rights might offend or disrupt the peace and quiet of others) are unjustifiable.

Finally, I believe that this theory solves the dilemma about children's constitutional rights which I outlined earlier. The question was, how can children be said to be "persons under our Constitution" with the "fundamental rights which the State must respect" and at the same time be regarded as individuals who are "always in some form of custody"? The answer is that younger children are persons in the sense that they have the right to be provided with opportunities and conditions assuring the full enjoyment of their constitutional rights when they acquire the characteristics of adult persons. Full enjoyment of their rights may be postponed until this is

accomplished. But this also explains the sense in which children are always in some form of custody. The child's right to be treated as a person is a right-in-trust. The child's parents, the school and the State are the trustees charged with the duty to help children develop into fully autonomous adults capable of enjoying their constitutional rights.<sup>60</sup>

As the child grows older and acquires more of the characteristics of a fully autonomous adult, then the obligation to respect his choices and to place upon him the responsibility for the choices he makes becomes even stronger. Hence, the only ground that the custodian of an older minor can use to justify postponing the enjoyment of the minor's right to be treated as a person is that postponement is necessary to assure the child's development into a fully autonomous adult.

### *A. Objection and Reply*

We have called this the "Enjoyment Theory of Children's Constitutional Rights," or ECCR. The major objection to ECCR is the same as the objection that I launched against the "balancing" theory of children's constitutional rights discussed earlier, namely that the very idea of protecting a kind of action as a constitutional right excludes the possibility of weighing it against other interests. For example, once having pronounced abortion to be within the area of constitutional protection for a female minor, it is no longer open to the Court to "weigh" that protection against other considerations

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<sup>60</sup> The Enjoyment Theory also can be employed to resolve the debate over whether and to what extent parents should have rights to control the lives of their children. Since the right of a child to control his own life is a right-in-trust, the parent has the *privilege* to raise the child to become a fully capable, self-determining adult who can make autonomous choices. A parental privilege is not a parental right or entitlement. Parents should not be allowed to assert a right against state interference with the parents' child-rearing practices. Other recent philosophers have reached the same conclusion. James G. Dwyer for example, observes that:

A parental privilege would legally permit certain adults to act as parents . . . but it would not accord those adults any legal claims of their own against state efforts to restrict their child-rearing practices or decision-making authority. Importantly, however, the legal regime I propose would accord such claims to children; children would possess a right against any state interference with their parents' child-rearing practices or choices that would not, on the whole, improve the children's well-being, and parents would be authorized to act as agents for their children and assert the children's rights against any inappropriate state action.

JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 64 (1998); see DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 122-32 (1993) ("There are at least as many conceptions of the best upbringing as there are conceptions of the good life. As the state should be neutral on the latter, so it should not take a view of the best upbringing.").

(e.g., strengthening the family unit, or protecting the young mother from harm). How, then, can I consistently maintain the position that a child's enjoyment of a constitutional right might legitimately be postponed when there is evidence that exercise of the right will damage the child's future autonomy? Am I not suggesting that the Court "balance" the child's interest in her future autonomy against the exercise of her constitutional right?

The reply to this objection is that a temporary interference with another's liberty for the purpose of protecting his future ability to act autonomously is not a case of balancing one interest against another. Let me use an analogy developed by John Stuart Mill to explain.

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.<sup>61</sup>

Analogously, if we postpone a child's exercise of his constitutional rights because there is a substantial risk that his exercise of those rights at this moment might prevent him from ever exercising them again, we have not balanced one interest against another. To use Mill's words, we have not infringed on his liberty, "for liberty consists in doing what one desires,"<sup>62</sup> and (we might reasonably assume) the child does not desire to cripple his future ability to exercise his rights.

### *B. Application of the Enjoyment Theory to a Fourth Amendment Case*

Let me conclude by illustrating the Enjoyment Theory with an application of it to one of the Fourth Amendment cases recently considered by the Supreme Court. The conclusion I reach in this case is markedly different from that reached by the Court's majority.

Having previously found that state-compelled urinalysis is a type of "search" within the meaning of the Fourth Amendment,<sup>63</sup> the Supreme Court held in 1995 that random, suspicionless drug testing of high school student athletes did not

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<sup>61</sup> JOHN STUART MILL, ON LIBERTY 117 (Gertrude Himmelfarb ed., Penguin Books 1982) (1859).

<sup>62</sup> *Id.* at 119.

<sup>63</sup> See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 656, 665 (1989) (holding that state-compelled urine collection and analysis is a search within the meaning of the Fourth Amendment).

violate the Fourth Amendment.<sup>64</sup> The Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches . . . , shall not be violated . . . ."<sup>65</sup> A paradigm case of an unreasonable search is one conducted on an individual whom the State does not suspect of having committed a crime. As Justice O'Connor argued in her dissent, "what the Framers of the Fourth Amendment most strongly opposed . . . were general searches – that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority."<sup>66</sup> The Court's majority rejected this argument, responding that since school children already have a lesser "legitimate expectation of privacy"<sup>67</sup> than adults, the school administrators need only show that they have a sufficiently important interest in conducting the random tests in order to justify them.<sup>68</sup> Deterrence of drug use by students, the Court concluded, is an interest that is important enough to provide the requisite justification.<sup>69</sup>

Application of the Enjoyment Theory to this case would generate a different result. First, children have the same Fourth Amendment right to be protected against unreasonable searches of their persons as the right possessed by adults. Children are persons who do not "shed their constitutional rights . . . at the schoolhouse gate."<sup>70</sup> Second, a child's Fourth Amendment right is not a right of a "lesser magnitude" than the Fourth Amendment right of an adult, and it is not to be balanced by government interests that we would not accept as outweighing an adult's Fourth Amendment rights.

However, consistent with the Enjoyment Theory, there are conditions under which the state may legitimately postpone a child's full enjoyment of his constitutional rights. This might happen under the condition that complete enjoyment of the right at this time will retard or detrimentally affect the child's development into an autonomous adult. In *Vernonia*, full

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<sup>64</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (holding that random urinalysis drug testing of students who participate in school athletics is constitutional).

<sup>65</sup> U.S. CONST. amend. IV.

<sup>66</sup> *Vernonia*, 515 U.S. at 669.

<sup>67</sup> *Id.* at 658.

<sup>68</sup> See *id.* at 664-65.

<sup>69</sup> See *id.* at 661.

<sup>70</sup> *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that high school students wearing black arm bands to protest the Vietnam conflict did not interfere with school activities and was constitutionally protected).

enjoyment would mean that a school-child, like an adult, cannot be subjected to random, suspicionless searches. The factual question for the Court to answer is whether allowing student athletes full enjoyment of their Fourth Amendment rights would impair their future ability to be individuals who are able freely and in an informed way to make choices and to accept responsibility for their choices.

There is little doubt that there are some drugs that, if ingested by a child, will reduce his chances of developing into an autonomous adult. The risk of addiction and/or permanent effects on the brain are directly related to the ability of a person to make voluntary choices. Hence, it might be concluded, the State can justifiably postpone a school child's enjoyment of the Fourth Amendment right to refuse a random, compulsory drug test.

But this argument is flawed. If the objective is to reduce the risk that a school-child will impair his development into an autonomous adult, it does not follow that the State may use any method it wishes, including random, suspicionless drug testing, to bring about this result. The state may only use random, suspicionless drug testing if it is the least intrusive method of preventing student athletes from using drugs. It is clear that it is not. For example, suspicion-based testing is a method that would lead to fewer tests and at the same time allow students to retain more control over their own persons while effectively addressing the legitimate goals of the school to reduce the amount of drug use among its student athletes.<sup>71</sup> I conclude that there is no basis for denying student athletes the full enjoyment of their Fourth Amendment right to be free from random, suspicionless searches of their persons, including the right to refuse a drug test.

## V. CONCLUSION

"Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect."<sup>72</sup> When Justice Fortas wrote these memorable words, he was not abiding by either the "Framers' Intent" or the "Original Understanding" theories of constitutional interpretation. That is, he was not making the claim that those who participated in formulating the

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<sup>71</sup> See, e.g., *Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting) ("Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched . . .").

<sup>72</sup> *Tinker*, 393 U.S. at 511.



amendments to the Constitution intended to include children under its provisions; I doubt that Justice Fortas thought that the amendments were generally understood at the time of their adoption to apply to children.<sup>73</sup> Instead, I believe that if he were alive today, he would probably agree with legal philosopher Ronald Dworkin that the Constitution and its amendments should be interpreted in light of the strongest philosophy of government that could justify them.<sup>74</sup>

At least part of the strongest philosophy of government that could justify the classification of children as persons is the moral principle of individual autonomy, which I understand to be the right of a person to govern himself, to be free from any external control to which he has not consented. If this principle is part of the moral justification of our Constitution, then it becomes clear why we should include children under its provisions. Young children do not have the competence to make many of the choices that adults make on a regular basis in complex social systems, but they will in a few years develop many of these competencies. Hence, the right to be treated as a person is best understood as a right-in-trust. Once we acknowledge this, it becomes legitimate for children to complain if they are not provided with opportunities and conditions assuring their full enjoyment of their constitutional rights when they acquire the characteristics of persons.<sup>75</sup> Moreover, the classification of children as persons as a right-in-trust is not only consistent with their being regarded as individuals in custody during their minority, but it defines the limits of our custodial duties. We must provide them "the conditions for their becoming individuals who are able freely and in an informed way to choose and who are prepared themselves to assume responsibility for their choices."<sup>76</sup> And we must refrain from denying children the enjoyment of their rights if we cannot show that this is necessary to protect their future autonomy. Only in this way can

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<sup>73</sup> For an extended treatment of the Framers' "original understanding," see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

<sup>74</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 411 (1986) (arguing that judges should adopt an interpretation which, "all things considered, makes the community's legal record the best it can be from the point of view of political morality").

<sup>75</sup> See HERBERT MORRIS, *Persons and Punishment*, in *ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY* 31, 49-50 (1976) (analogizing constitutional rights of children to future interest rights in property law with their concomitant legal obligations and structures to protect future interests).

<sup>76</sup> *Id.* at 50.

we legitimately discharge our custodial duties toward children as persons.